92/95

CASE NO: 280/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

EMMAH MBOKANE	1ST APPELLANT
DAVID MNGUNI	2ND APPELLANT
VERSUS	
NATIONAL EMPLOYERS' GENERAL INSURANCE	
COMPANY LIMITED	1ST RESPONDENT
PUTCO LIMITED	2ND RESPONDENT

CORAM: SMALBERGER, VIVIER, FH GROSSKOPF, HOWIE et SCHUTZ JJA

DATE HEARD: 25 MAY 1995

DATE DELIVERED: 12 SEPTEMBER 1995

JUDGMENT

SCHUTZ JA:

I have had the benefit of reading my brother Smalberger's judgment. My disagreement with his conclusion relates to the critical question whether the appellants have proved, as a matter of probability, that the driver was negligent in continuing on his way knowing that there was something wrong with one of his tyres.

For negligence to be established on the part of the driver before the tyre burst the appellants have to prove two things. The

first is that the bus was driven for a considerable distance with an under inflated tyre, which led to the building up of heat and the eventual destruction of the tyre. The second is that the driver should have been aware of the under inflation and ignored it.

I shall deal with the latter point first. All the evidence is to the effect that everything was going normally until the bang which signified the bursting of the tyre. There was no hesitation by the driver, no wrestling with the steering wheel and no slowing down. When dealing with the under inflation theory in cross-examination Harre said:

> "But surely if the tyre was partially deflated there would be such a drag on the steering that the driver would know that he has a partially deflated tyre."

That evidence is not contradicted. But even if little or no weight is attached to it the form of negligence under discussion is premised upon awareness of something wrong on the driver's part. I find it most unlikely that a bus driver faced with such a drag on his steering wheel would continue on his way blithely as if nothing had happened, putting at risk not only the lives of his passengers but also that of himself. So that, however much I agree with my brother Smalberger as to the driver's duty if he had felt that something was wrong, I cannot agree with his conclusion.

I return to the first point, has it been proved that the tyre was under inflated? There is no direct evidence of any kind on this point. The only evidence that there is is that of an expert on either

side, Mr Keuler, a rubber expert from the SABS who was called for the appellants, and Mr Harre of Firestone who was called for the respondents. He has been with Firestone since 1967 and his expertise includes the identification of the causes of tyre failures.

Keuler's theory (I doubt that it is an opinion) is that the bus was driven for a considerable distance with the tyre under inflated or the bus overloaded. The flexing caused to the side wall each time the tyre reached the bottom of a revolution would lead to the building up of a lot of heat, which might lead to the bursting of the tyre. Harre's opinion, by contrast, was that the tyre had burst as a result of an impact fracture, caused by its striking a hard sharp substance of substantial size, such as a stone.

I have said already that Keuler's theory seems to fall short of an opinion. He based himself mainly on a blueish discolouration of some of the rubber which was the result of heat. Such heat in the tyre, he said, was "normally" the result of overloading or under inflation. The fact that the side wall was ripped was also "normally" a sign of the same. But he agreed that he could not be categoric, that there are all sorts of possibilities, including impact damage caused by a stone of substantial size or a pothole. He was questioned as to whether the heat could not have been generated after the tyre burst, whilst it was being mangled before the bus hit the bridge. He seemed to doubt that the distance would have been sufficient, but he did agree that the flexion after bursting would have

been much more than during under inflation before the bursting.

Harre accepted that bursting because of under inflation was "a thing that can happen". But he did not consider that it was the cause in this case. He placed considerable emphasis upon heat inversion. As I understand his evidence, when rubber is heated (in the course of being vulcanized) it is strengthened, but if too much heat is applied thereafter it is weakened again, reverting to its original state. In explaining why he did not believe that the under inflation theory was the correct one, he said:

> "I believe that the amount of heat generated from extended running in either the overloaded or under-inflated condition will cause the interface separations which will show a stickiness that comes from the rubber being excessively heated and the interfaces separating.

> This case here it is actually not interface separation, it is actually torn. It is torn apart rather than separating."

Although his inspection for stickiness was confined to visual examination and was not backed up by any test, I consider that weight should be attached to his experienced eye when he says that there was a tearing not a separation caused by heat. Although Keuler was not fully cross-examined on this subject he did accept the theory of heat reversion. After this concession the following appears:

> "He will also say (Harre) that there was no evidence present on any of the pieces of tyre available for inspection of such heat induced reversion of the rubber. ... I would not be able to argue against that. The question is how was that determined?"

At the Bureau of Standards, he said, the presence or

absence of heat reversion could be tested. But he himself performed no such tests. Keuler also said that one would find the stickiness only in a "very advanced state of reversion" . Harre took this up and said:

> "Mr Keuler testified that you only get a sticky tacky texture to the tyre in a case of a extreme heat inversion. ... Yes but it takes that type of heat to get the separations occurring in a tyre."

Harre also said that he did not observe any substantial amount of blueing, and that such as there was could have been caused by the tyre being stored exposed to the sun.

All in all I am considerably more impressed by the evidence of Harre than that of Keuler. But all that I need say is that

I do not consider Keuler's evidence to be superior to that of Harre, and for that reason I do not think that the appellants have proved on the probabilities that the bus was driven with the tyre in a state of under inflation.

It is true that no sharp object was produced. I do not find that surprising given the conditions that must have prevailed after this awful accident. Not even all of the burst tyre was retrieved, which has contributed to or even caused the appellants' difficulty in proving what caused the tyre to burst. Moreover, the driver is dead.

In the result I do not think that the appellants have proved either of the two things that it was incumbent on them to prove, or, consequently, that the driver drove negligently before the

tyre burst.

The appeal accordingly falls to be dismissed, and consequently also the condonation applications referred to in my brother Smalberger's judgment. I agree with him that the appellants' Pretoria attorneys should bear the wasted costs of applications (c) and (d).

The following order is made:

The condonation applications are dismissed. The appellants are to pay any wasted costs occasioned by the applications relating to the late filing of their notice of appeal and their powers of attorney, jointly and severally. The appellants' Pretoria attorneys are to pay the wasted costs occasioned by the applications relating to the

late filing of a proper record, as well as an additional volume of the record.

The appeal is dismissed with costs to be paid by the appellants jointly and severally.

W P SCHUTZ
JUDGE OF APPEAL

VIVIER JA
CONCUR
HOWIE JA